



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KISII

ENVIRONMENT AND LAND CIVIL CASE NO. 279 OF 2009

PETER OGWENO MALIMU

(Suing as legal administrator of JOHNSON MALIMU

AJUANG, deceased)..... PLAINTIFF

VERSUS

JOSEPH ODONGO OGUTTU DEFENDANT

JUDGMENT

1. The plaintiff is the legal representative of the estate of one, **Johnson Malimu Ajwang**, deceased (hereinafter referred to only as “**the deceased**”). The deceased was at all material times the registered proprietor of all that parcel of land known as **LR No. Kamagambo Kanyajuok/1131** (hereinafter referred to as “**the suit property**”). The plaintiff brought this suit against the defendant on behalf of the estate of the deceased on 22nd December 2009 seeking an order for the eviction of the defendant from the suit property. In the plaint dated 22nd December 2009, the plaintiff averred that, on 27th December 1985, the defendant caused the suit property to be sub-divided into two (2) portions namely; **Kamagambo/Kanyajuok/1296** and **Kamagambo/Kanyajuok/1297** (hereinafter referred to as “**Plot No. 1296**” and “**Plot No. 1297**” respectively) without the consent of the deceased and fraudulently caused Plot No. 1297 to be registered in his name. The plaintiff contended that following the said unauthorized subdivision and fraudulent acquisition of Plot No. 1297 by the defendant, the defendant entered Plot No. 1297 on 8th March 2008 without any right or lawful cause for doing so and commenced cultivation thereon. The plaintiff averred that the deceased had only leased a portion of the suit property to the defendant for planting of sugarcane and that at no time had the deceased sold to the defendant the suit property or any portion thereof. The plaintiff averred that the sub-division and acquisition of a portion of the suit property by the defendant was carried out fraudulently in that; the deceased did not transfer Plot No. 1297 to the defendant, the purported transfer was not approved by the Land Control Board, the deceased did not enter into any agreement for sale with the defendant and, the defendant did not pay stamp duty on the transfer of Plot No. 1297.
2. The defendant entered appearance and filed a statement of defence on 14th January 2010. In his defence, the defendant denied that he caused the suit property to be sub-divided without the consent of the deceased and that he trespassed on the suit property on 8th March 2008. The defendant denied all the particulars of fraud pleaded against him in the plaint. The defendant averred that he is a bona fide purchaser for value of Plot No. 1297 which is a portion of the suit property. The defendant averred that he entered into an agreement for sale of a portion of the suit property with the deceased pursuant to which the deceased caused the suit property to be sub-divided into two portions namely Plot No. 1296 and Plot No. 1297. The deceased thereafter

- transferred Plot No. 1297 to him. The defendant averred that he has had continuous and uninterrupted possession and use of Plot No. 1297 from 1984. The defendant contended that the plaintiff's suit is legally untenable on account of the fact that the same is time barred under the Limitation of Actions Act, Cap 22 Laws of Kenya and also due to the fact that the suit property in respect of which the reliefs have been sought herein is no longer in existence.
3. When the suit came up for hearing, the plaintiff gave evidence and called two witnesses. On his part, the defendant gave evidence but did not call any witness. In his evidence, the plaintiff told the court that he is the son of the deceased and that he was issued with a limited grant of letters of administration in respect of the estate of the deceased on the strength of which he has brought these proceedings. He testified that the deceased was at all material times the proprietor of the suit property that was registered in the name of the deceased on 31st August 1981. On 5th September 2003, he did a search on the title of the suit property and discovered that the suit property had been sub-divided into two portions namely, Plot No. 1296 and Plot No. 1297. The search also revealed that Plot No. 1296 was registered in the name of the deceased while Plot No. 1297 was registered in the name of the defendant. The deceased had before his death told him that he had only leased a portion of the suit property to the defendant. The lease was however not reduced into writing. When he took up the issue with the defendant, the defendant told him that he would vacate the suit property after harvesting the sugar cane that he had planted thereon. He told the court that the deceased sold land only to two people namely, Philip Oyoo Osiro to whom he sold Plot No. 1132 and Albert Onyango to whom he sold Plot No. 1133. He told the court that he is the one occupying the suit property and that he has planted maize and sugarcane thereon.
 4. In cross-examination by the defendant's advocate, he stated that he was born in 1977 and that his father the deceased, died in the year 2008. He stated further that he was not aware that his father had entered into any agreement for sale with the defendant in relation to the suit property. On being asked whether he had any documentary proof that the deceased had leased the suit property to the defendant, he answered in the negative. He stated that the defendant has been cultivating the disputed property since the year 1985. He maintained that he has been cultivating the suit property and that he is a stranger to Plot No. 1297. He stated that the documents held by the defendant in support of his claim over Plot No. 1297 are fraudulent. He stated that the suit property is a sub-division of the original parcel of land known as Plot No. 144 that was sub-divided into two portions namely, Plot No. 1131 and Plot No. 1132. He told the court that he is not aware of the circumstances under which Plot No. 1131(the suit property) was sub-divided into Plot No. 1296 and Plot No. 1297. He denied that the deceased sold Plot No. 1297 to the defendant. In re-examination, he stated that the deceased was illiterate and used to sign documents using his thumb print. The plaintiff produced in evidence as exhibits; letters of administration ad litem in respect of the estate of the deceased that was issued to him by the High Court at Kisii on 13th October, 2009, a copy of the register for the suit property, a certificate of official search dated 5th September, 2003 on the title of Plot No. 1296, a certificate of official search dated 21st October, 2009 on the title of Plot No. 1297 and a copy of the register for Plot No.1296.
 5. The plaintiff's first witness was the plaintiff's mother, Hellena Atieno Malimu ("PW2"). PW2 told the court that; she is the widow of the deceased. The deceased died in the year 2007. The deceased had leased a parcel of land the particulars of which she could not remember to the defendant. The defendant initially planted maize on the said parcel of land but later on started cultivating sugarcane. The term of the lease that was granted to the defendant by the deceased expired but the defendant refused to vacate the property that had been leased to him. The parcel of land that is occupied by the defendant was not sold to him by the deceased and that the defendant could have obtained a title to the said parcel of land through fraud.
 6. In cross-examination, PW2 stated that she had no document to support her contention that the suit property was leased by the deceased to the defendant. She stated further that she was not present when the defendant and the deceased entered into the alleged lease agreement. She stated that she could not remember when the suit property was leased to the defendant by the deceased although the defendant has been in occupation of the suit property for several years. She stated that the defendant entered onto the suit property before the plaintiff was born and that there is a clear boundary between the portion of the suit property which is occupied by the defendant and the portion occupied by her family. She stated that the defendant has never paid any rent to her for

the suit property. She denied that the deceased had sold the disputed property to the defendant. She stated further that the deceased had before his death asked the defendant to vacate the suit property. The plaintiff's second witness was his uncle, Wilson Odhiambo Ochieng (PW3). PW3 corroborated the evidence of PW1 and PW2 to the effect that the disputed parcel of land was leased by the deceased to the defendant. He stated however that he was not present when the property was leased by the deceased to the defendant. He stated that he was not aware of any sale transaction between the deceased and the defendant over the suit property. In cross-examination, PW3 stated that he was not aware of the date when the disputed property was leased to the defendant by the deceased who died in the year 2007. He stated that the defendant started cultivating the suit property in the year 1979 and that there is a clear boundary between the parcel of land occupied by the plaintiff and the one occupied by the defendant.

7. In his evidence, the defendant told the court that he entered into an agreement for sale of land with the deceased on 31st December 1974. The agreement was for the purchase of a portion of the suit property at a consideration of kshs. 5300/= which he paid in full to the deceased. The agreement for sale was in writing and the same was signed by him and the deceased before witnesses who are all now deceased. Pursuant to this agreement, the deceased obtained consent of the Land Control Board to sub-divide the suit property into two portions and another consent to transfer one of the portions of the suit property to him. The said portion was ultimately registered in his name after the payment of the registration fees for the transfer and stamp duty. He told the court that he has been cultivating the said portion of the suit property from the time the same was sold to him to date. He denied that he trespassed on the suit property in the year 2008. The portion of the suit property that was sold and transferred by the deceased to him is **LR No. Kamagambo/Kanyajuok/ 1297 ("Plot No. 1297")**. He stated that he has restricted his activities to Plot No. 1297. He stated that Plot No. Kamagambo/Kanyajuok/1131 ("the suit property") claimed herein by the plaintiff does not exist as the title thereof was closed upon the subdivision that gave rise to Plot No. 1296 owned by the plaintiff's family and Plot No. 1297 owned by him (the defendant). The defendant denied the plaintiff's claim that Plot No. 1297 was leased to him by the deceased. He stated that the plaintiff's complaint against him before the local sub-chief was dismissed. He produced in evidence as exhibits; a copy of an agreement dated 31st December 1974 between him and the deceased, a copy of application for consent of the Land Control Board dated 11th July 1978, a copy of letter of consent dated 29th September 1984, a copy of letter of consent dated 24th October 1984, a certificate of official search dated 20th May 2013 on the title of Plot No. 1297, a receipt dated 28th September 1984 issued at Migori for kshs. 325/=-, a receipt dated 2nd April 1985 for kshs. 100/=- issued at Homa Bay and a receipt dated 27th December 1985 for kshs. 50 issued at Homa Bay.
8. I have considered the plaintiff's suit as pleaded and the evidence tendered by the plaintiff in proof thereof. I have also considered the defendant's statement of defence and the evidence that was tendered by the defendant in his defence. Finally, I have considered the respective closing submissions by the advocates for the parties and the authorities that were cited in support thereof. The parties did not frame issues for determination by the court. From the pleadings and the evidence tendered before me, the following in my view are the issues that arise for determination in this suit;-

- i. **Whether the suit is competent?**
- ii. **Whether the defendant fraudulently caused Plot No. Kamagambo/Kanyajuok/1131 to be sub-divided and a portion thereof namely, Plot No. Kamagambo/Kanyajuok/1297 transferred to his name?**
- iii. **Whether the defendant is a trespasser on Plot No. Kamagambo/Kanyajuok/1131 or Kamagambo/Kanyajuok/ 1297?**
- iv. **Whether the plaintiff is entitled to the reliefs sought?**

9. Issue No. I;

The defendant contended that the plaintiff's claim against him herein is time barred under the Limitation of Actions Act, Cap 22 Laws of Kenya and as such is not maintainable. The defendant mounted a two

pronged attack against the plaintiff's claim under this limb of objection. The defendant submitted that the plaintiff's claim is based on fraud which is a tort. The defendant submitted that the limitation period for a tortious claim is three years from the date when the cause of action arose or when the fraud was discovered. This he submitted is in accordance with the provisions of sections 4 (2) and 26 of the Limitation of Actions act, Cap 22 Laws of Kenya. It is not in dispute that the property in dispute namely, Plot No. 1297 was registered in the name of the defendant on 27th December 1985 following a sub-division of Plot No. 1131 ("the suit property"). It is also not in dispute that this suit was filed on 22nd December 2009 after a lapse of over 23 years from the date when the suit property was sub-divided and a portion thereof namely, Plot No. 1297 transferred and registered in the name of the defendant. It is this sub-division of the suit property and transfer of Plot No. 1297 to the defendant that the plaintiff has claimed to have been conducted fraudulently.

10. The defendant contended that the plaintiff's suit should have been brought within three years from 27th December 1985 when Plot No. 1297 was registered in the name of the defendant. The defendant contended that since this suit was filed 23 years after that date, the suit is time barred. The defendant contended that even if it is assumed that the plaintiff discovered the alleged fraud much later after 27th December 1985, the suit is still time barred because it was filed after three (3) years from the date of the alleged discovery of fraud. In his evidence the plaintiff testified that he became aware that the suit property had been sub-divided and Plot No. 1297 being a portion hereof registered in the name of the defendant on 5th September 2003 following an official search that he carried out at the land's registry. If that is the case then, the plaintiff's claim should have been brought by 5th September 2006. The suit herein was therefore filed three years out of time computed from 5th September, 2003, if the time is reckoned from the date of the alleged discovery of the defendant's fraud. The defendant submitted further that even if it is taken that the plaintiff's claim is for the recovery of land and as such the limitation period that applies is twelve years pursuant to section 7 of the Limitation of actions Act, Cap 22 Laws of Kenya, this suit would still be out of time. This is because; the twelve year period lapsed on 27th December 1997 from the date of the accrual of the cause of action. That means the suit herein that was filed on 22nd December 2009 was filed 12 years out of time.

11. In response to these objections on the competency of the suit, the plaintiff's advocate submitted that the deceased died on 7th March 2008 and the grant of letters of administration was issued to the plaintiff on 13th October 2009. The plaintiff contended that the limitation period should be reckoned from the time he obtained letters of administration and not otherwise. The position taken by the plaintiff is not supported by statute law or any legal authority. The plaintiff brought this suit on behalf of the estate of the deceased. For the purposes of limitation of actions, time is reckoned from the date when the cause of action accrued either to the deceased or his estate. In this case, the cause of action accrued when the deceased was still alive. The death of the deceased could not therefore either extinguish the time that had started running or stop the time from running until a grant of letters of administration in respect of the estate of the deceased was obtained. In this case, the limitation period ran out before the death of the deceased. The same could not therefore be revived in favour of the deceased's legal representative. Section 7 of the Limitation of Actions Act, Cap 22 Laws of Kenya provides that where an action to recover land is brought on behalf of someone else, time is reckoned from the date when the cause of action accrued to the person on whose behalf the claim has been brought.

12. In this case, the claim by the plaintiff has been mounted on behalf of the estate of the deceased. Since the cause of action herein accrued while the deceased was still alive, time must be reckoned from the date when the cause of action accrued to the deceased. For the foregoing reasons, I am persuaded that this suit was filed out of time and as such the same is time barred and not maintainable against the defendant. The decision of my brother Mutungi J. in the case of **Charles Githuma Munge –vs- Peter Icharia Munge & Another [2014] eKLR** that was cited by the defendant's advocates supports the conclusion that I have arrived at above.

13. **Issues Nos. II and III;**

Having reached the conclusion that the plaintiff's suit is time barred, it is not necessary for me to consider the merit of the plaintiff's claim. I wish however to do so, so that my opinion on the merit of the case is

known to the parties lest I be accused of deciding the case on a technical point of limitation of actions only. In the case of **Virani t/a Kisumu Beach Resort –vs- Phoenix of East Africa Assurance Co. Ltd [2004] 2KLR 269**, it was held that; **“Fraud is a serious quasi criminal imputation and it requires more than, proof on a balance of probability though not beyond reasonable doubt...”**. In the case of **Jammieson Mkumbo Mbogho t/a Ziotech Motors –vs- Barclays Bank Ltd [2013] eKLR** that was cited by the defendant’s advocate, Kasango J. cited the court of appeal case of **Central Bank of Kenya Ltd –vs- Trust Bank Ltd & 4 Others, Civil Appeal No. 215 of 1996** in which the court stated as follows on proof of fraud;

“The appellant has made vague and general allegations of fraud against the respondent. Fraud and conspiracy to defraud are very serious allegations. The onus of prima facie proof was much heavier on the appellant in this case than in ordinary civil case.”

14. The gist of the plaintiff’s claim in this case is that the deceased had leased the suit property to the defendant and that the defendant fraudulently caused the suit property to be sub-divided and had a portion thereof namely, Plot No. 1297 registered in his name. In paragraph 7 of the plaint, the plaintiff set out particulars of the defendant’s alleged acts of fraud. I am in agreement with the submission by the defendant’s advocates that the plaintiff did not at all tender any evidence in proof of the alleged fraud. In his testimony, the plaintiff testified that he was born in 1977 and that the deceased had leased and not sold the suit property to the defendant. He however told the court that he had no proof that the suit property had actually been leased to the defendant. PW2 also maintained that the suit property was leased by the deceased to the defendant. She however stated that she was not present when the lease agreement was made and had no documentary proof thereof. PW2 could not also remember when the said lease agreement was made. PW2 stated that she could not remember when the defendant entered the suit property but it was before the plaintiff (PW1) was born. PW3 also supported PW1 and PW2’s contention that the deceased had leased the suit property to the defendant. PW3 like PW1 and PW2 was not present when the alleged lease agreement between the deceased and the defendant was entered into and could not also remember when the same was made. The defendant on his part gave evidence that he purchased Plot No. 1297 which is a portion of the suit property from the deceased in the year 1974 at a consideration of ksh. 5,300/=. Plot No. 1297 originated from LR No. Kamagambo/Kanyajuok/144 (“Plot No. 144”) that was registered in the name of the deceased. The agreement for sale was executed before four witnesses who are all deceased.
15. Following the said agreement, Plot No. 144 was subdivided by the deceased into several portions one of which was Plot No. 1131 (“the suit property”). The suit property was subsequently sub-divided and a portion thereof namely, Plot No. 1297 transferred by the deceased to the defendant. The defendant produced a copy of the agreement for sale that was made between him and the deceased on 31st December 1974 as an exhibit. The defendant also produced a letter of consent of the Land Control Board that approved the sub-division of the suit property into two portions and another letter of consent of the said Land Control Board that approved the transfer of Plot No. 1297 to the defendant. The two consents of the Land Control Board were issued to the deceased. The plaintiff contended that the deceased was illiterate and as such could not have signed the agreement for sale that is alleged to have been made between him and the defendant. The plaintiff also contended that the agreement for sale referred to Plot No. 144 and not the suit property. The agreement for sale that was produced by the defendant in evidence (D.Exh.1) was made on 31st December 1974. It was made before the plaintiff was born in 1977. The plaintiff could not therefore know whether it was signed by the deceased or not. In the place that was indicated for the signature of the seller, I have noted that it bears only the name of the deceased. It is not a signature as such. The plaintiff did not adduce evidence that the deceased could not even write his name. PW2 and PW3 who were adults when the said agreement was said to have been made did not contest the contents of the same. They did not comment on the execution thereof by the deceased or the witnesses who are said to have witnessed the execution thereof.
16. The plaintiff did not challenge the letters of consent that are said to have been issued to the deceased for the sub-division of the suit property and for the transfer of Plot No. 1297 to the defendant save only to say that the letter of consent that was issued for the sub-division of the suit

property had alterations. Since the plaintiff had contended that the sub-division of the suit property and the transfer of Plot No. 1297 to the defendant were fraudulent, it was upto the plaintiff to place evidence before the court that these letters of consent were not issued properly. Nothing would have been easier for the plaintiff than to obtain records from the office of the Central Land Control Board, Rongo from where the said letters of consent originated to demonstrate that the deceased did not appear before the said Land Control Board or that the said Land Control Board did not issue the said letters of consent. On the plaintiff's contention that the agreement for sale which the defendant produced in evidence referred to Plot No. 144 and not the suit property (Plot No. 1131") or Plot No. 1297, the defendant explained which explanation is supported by the material on record that Plot No. 1131 ("the suit property") was a sub-division of Plot No. 144 and that Plot No. 1297 that is said to have been transferred by the deceased to the defendant is a sub-division of Plot No. 1131 ("the suit property"). The defendant is said to have purchased only a portion of Plot No. 144 which is Plot No. 1297 that is registered in his name.

17. Having carefully analyzed and evaluated the evidence of the plaintiff and his witnesses on one hand and the defendant on the other hand, I am inclined to accept the evidence of the defendant that he purchased Plot No. 1297 from the deceased. As I have stated above, the plaintiff's claim that the deceased had leased the suit property to the defendant is not supported by any evidence. All those who testified regarding the alleged lease were not present when it was made and do not even know when it was actually made. The defendant's contention that he purchased Plot No. 1297 is however backed with material evidence that has not been challenged in any material respect. I have also noted that the defendant has been in occupation of the suit property since 1970's and was in such occupation when the deceased died in the year 2007. It is not clear and the plaintiff did not explain why the deceased did not file a suit for the eviction of the defendant if at all the defendant was a trespasser on the suit property. Why was the suit not filed until after the death of the deceased? It is my finding that the defendant acquired Plot No. 1297 from the deceased through purchase. The said parcel of land was not acquired by the defendant fraudulently as claimed by the plaintiff. The plaintiff has not adduced evidence in proof of the alleged fraud in the acquisition of the suit property. The defendant having acquired Plot No. 1297 lawfully as aforesaid, his occupation of the same is lawful. The defendant is therefore not a trespasser either on the suit property or on Plot No. 1297.

18. Issue No. IV;

The plaintiff has sought an order for the eviction of the defendant from Plot No. 1131 ("the suit property"). The plaintiff's exhibit P.exh. 2 shows that the title of Plot No. 1131 was closed on sub-division that gave rise to Plot No. 1296 and Plot No. 1297. The plaintiff's exhibits P.exh. 3, P.exh.4 and P.exh. 5 show that Plot No. 1131 was sub-divided and that the sub-division gave rise to Plot No. 1296 and Plot No. 1297 aforesaid. From the foregoing, it is clear that Plot No. 1131 ("the suit property") is no longer in existence. If the court was to grant the relief sought by the plaintiff, the order would be in vain. A court of law cannot grant an order which cannot be executed. It is therefore my finding that even if the plaintiff had proved his claim against the defendant, the court would not have granted the relief sought by the plaintiff.

19. Conclusion;

Arising from the above, I have come to the conclusion that the plaintiff has failed to prove his case against the defendant. The plaintiff's case fails for being time barred and also for not having been proved on a balance of probability. The suit is dismissed with costs to the defendant.

Delivered, signed and dated at KISII this 13th day of February, 2015.

S. OKONG'O

JUDGE

In the presence of:-

N/A for the plaintiff

Mr. Mose L. for Abisai for the defendant

Mr. Mobisa Court Clerk

S. OKONG'O

JUDGE